IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 460 OF 2005

Habib Dharamsi Shivani ... Appellant

V/s

Bhavarlal Dhanraj Sanghvi ... Respondent

Smt. Jyoti Chavan for the appellant.

Mr. K.Y. Mandlik for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 4TH JULY, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Ad-hoc District Judge, Pune, dated 7.8.2004 allowing the appeal and decreeing the suit of the plaintiff by setting aside the judgment and order passed by the Civil Judge, Jr.Divn., Pune, dated 17.4.2001 dismissing the plaintiff's suit for declaration and injunction.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiff had filed the suit for declaration and injunction and the relief was sought with regard to the ventilator existing in between the property of the present appellant-respondent and then with regard to the air-conditioner which has been alleged to be erected and fixed in the property of the appellant. House Nos. 24 and 25 alleged to be purchased by the respondent recently from its owner in the year 1996 vide registered sale deed. The defendant was owner of the house bearing No. 26 which is alleged to be at South side of the property of the respondent. It was alleged that the defendant made construction in his property house No.26 unauthorisedly and without permission of the Contonment Board. It was further alleged that the defendant made construction of first floor in his property. There were no doors or windows on the southern side wall in defendant's property. It is further alleged that there was a stair-case leading directly to the first floor of plaintiff's property and the said staircase was exclusively belong to plaintiff-appellant. The plaintiff later on converted the wooden staircase into R.C.C. staircase. The staircase is alleged to be enjoyed by the plaintiff-appellant for going to the first floor in his property since beginning. The defendant alleged to have open windows on first floor in

the northern wall by making illegal construction in the year 1980 and has subsequently put up air-conditioner which is obstructing the way of the present respondent to go to the first floor via staircase. Hence the suit came to be filed for declaration and injunction.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had failed to prove that the act of the defendant was illegal in installing windows and ventilator as well as air-conditioner in the northern wall and, as such, the suit came to be dismissed.

The appeal was carried to the District Court, Pune. The learned Addl. District Judge, Pune, partly allowed the appeal. It was held that the defendant had fixed the air-conditioner in the northern wall of his house No.26 illegaly which is projecting over the stair-case of the plaintiff and causing inconvenience to the plaintiff in enjoyment of staircase due to projecting the air-conditioner over the staircase and, as such, the appeal was allowed. It was directed that the air-conditioner put up by the defendant in the property over the staircase was illegal and unauthorised and, therefore, the defendant was perpetually restrained from

causing any obstruction in the enjoyment of disputed staircase existing in the said property and hence mandatory injunction was issued to the effect that the air-conditioner should be taken away which was projecting on the property of the plaintiff on staircase. Being aggrieved by the said order, present appeal is filed.

4. At the outset, it must be noted that all the issues involved in this appeal are the issues of fact and, therefore, cannot be gone into in the second appeal. The learned counsel for the appellant vehemently urged that the substantial question of law which was involved includes, whether the respondent was entitled to easementary right vis-a-vis an unauthorised staircase. However, in this regard, it must be noted that the defendant did not raise this issue either in the pleadings or at the time of adjudication at the trial stage. This fact was sought to be argued for the first time in the lower appellate Court. However, the learned first appellate Court Judge dealt with that aspect and has observed that the defendant did not plead its case for easement in details in its written statement and, therefore, for want of this pleading and supporting evidence, it was difficult to express any opinion about

the easementary right of the defendant regarding windows and ventilator in the northern wall. In view of these aspects, the point of issue of easement was kept open without prejudice to the rights of the parties, however, at the same time it was further observed that the defendant could not be restrained from enjoying ventilator and windows existing in northern wall nor they can be declared as illegal construction.

In these factual matrix, it is to be noted that the Apex Court time and again has categorically held that the High Court cannot substitute its own finding on reappreciation of evidence merely on the ground that another view was possible. The Supreme Court also observed in the case of **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar & ors., reported in (1999) 3 SCC 722** that it is not within the domain of the High Court to investigate the ground on which the findings were arrived at by the last Court of fact, being the first appellate Court.

In the present case before us, I am satisfied that the lower appellate Court Judge has rightly refused to entertain the adjudication of the issue of easementary right of the concerned parties for want of pleadings and

also has rightly left the issue open. Needless to say that the concerned parties will be at liberty to pursue this remedy if so advised. However, the fact remains that the present appeal is seen to be rightly adjudicated on the basis of available factual aspects of the evidence and, therefore, would brook no interference.

In the result, the appeal stands dismissed with no order as to costs. Consequently, the Civil Application No. 190 of 2005 also stands dismissed with no order as to costs.

5. At this stage, the learned counsel for the appellant seeks stay of this order. In view of the facts and circumstances, the order stands stayed for a period of six weeks.

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